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No. 344

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES L. SOBER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the District Court (R. 390a-415a) are not reported. The opinion of the Court of Appeals (Pet. App. 52-67) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 72) was rendered on June 24, 1960. A petition for rehearing (Pet. App. 74) was denied on July 22, 1960. The petition for a writ of certiorari was filed

August 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support the convictions.

2. Whether the summation by the government, in response to opposing counsel, prejudiced petitioners so as to call for a new trial.

3. Whether petitioners Reese and Ira Sober were properly tried with the remaining petitioners.

STATUTE INVOLVED

18 U.S.C. 220, provides:

> Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

STATEMENT

1. The charges and sentences.

Petitioners were convicted by a jury in the United States District Court for the Western District of Pennsylvania of offenses arising from transactions involving The Old Freeport Bank, the deposits of which were insured with the Federal Deposit Insurance Corporation. There were two indictments which were consolidated for trial without objection (R. 2a, 8a).[1]

The offenses for which petitioners were convicted and sentenced were as follows: petitioner Heineman, as a director of the bank, for receiving a fee of $2,000 in procuring a loan from the bank for Leo and Emma Gallagher; petitioner C. L. Sober, as executive vice-president of the bank, for aiding and abetting said transaction, and both Sober and Heineman for conspiring to commit the offense (R. 521b-522b, 409a); petitioner Heineman, as a director of the bank, for receiving a fee of $800 for procuring a loan from the bank for John and Sylvia Burkett; peti-

[1] The record filed by petitioners consists of the appendices printed for the Court of Appeals, supplemented by the Court of Appeals proceedings. Petitioners' appendix below consisted of one volume and the government's appendices consisted of two volumes. Both petitioners' and the government's records were separately paginated and differentiated by the addition of the suffix "a" for petitioners' appendix, and by the addition of the suffix "b" for the government's appendices. The government's appendices were consecutively paginated. Accordingly, we will add the corresponding suffix designation, as printed below, in differentiating the record references cited in this brief.

tioner C. L. Sober for aiding and abetting said transaction, and both Heineman and Sober for conspiring to commit the offense (R. 522b-523b, 409a); petitioner Cypher, as a director of the bank, for receiving a fee of $23,000 for procuring a loan from the bank for Gustav C. Heyman; petitioner C. L. Sober as president of the bank for aiding and abetting said transaction, and both Sober and Cypher for conspiring to commit the offense (R. 525b, 409a); petitioner Ira L. Sober, as executive vice-president of the bank, in two counts for making false entries as to the balance of outstanding loans insured by the Federal Housing Administration (R. 544b-545b, 410a); petitioners Ira L. Sober, Jack C. Reese, and C. L. Sober, in two counts, for making a false entry in reports of the condition of the bank (R. 545b, 410a), and petitioners Ira L. Sober and Reese for making a false entry in connection with the cash balance in the bank (R. 546b, 410a).

Petitioner Charles L. Sober was sentenced to one year's imprisonment and to pay a fine of $500 on each of 8 counts—the sentences to run concurrently (R. 5a, 12a). Petitioner Heineman was sentenced to 9 months and to pay a fine of $500 on each of 4 counts—all terms concurrent (R. 5a, 13a). Petitione Cypher was sentenced to 9 months and to pay a fine of $500 on each of two counts—both terms to be served concurrently (R. 12a). Petitioner Ira L. Sober was placed on probation for 3 years and fined $500 on each of 5 counts, and petitioner Reese was placed on probation for 3 years and fined $500 on each of 3 counts—all probation terms running concurrently (R. 13a).

2. The evidence.

a. *The fee-receiving and conspiracy counts.*

(1). Mr. Leo Gallagher sought a loan of $15,000 from the bank to buy out his partner and do some remodeling (R. 19a). After appraising the property, petitioner Charles Sober told him that they could lend him no more than $10,000 (R. 21a). Later, when Mr. Gallagher again approached petitioner Charles Sober for help, Sober suggested that he see petitioner Heineman, a director of the bank (R. 22a, 275a).[2] Petitioner Heineman arranged for Mr. Gallagher to obtain a loan of $17,000 from the bank, $2,000 of which was for petitioner Heineman (R. 27a-29a). Mr. Gallagher described this as a "kickback" (R. 29a, 53a). Heineman claimed the $2,000 fee was for furnishing the bank with a certificate of deposit as collateral for the amount in excess of that which the bank would loan (R. 279a-280a).

(2). Mr. and Mrs. Burkett saw petitioner Charles Sober at the bank for a loan and were told to see Heineman (R. 67a). After they did so, a bank loan of $5,900 was arranged (R. 68a-69a), of which Heineman received $800 as a commission (R. 77a-78a). Heineman claimed that the $800 was for putting up a certificate of deposit with the bank and partly for a bill they owed him of "over $200" (R. 286a-287a).

(3). Mr. Gustav C. Heyman saw petitioner C. L. Sober at the bank to secure a loan of $23,000 (R.

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[2] Petitioner Sober claimed that Mr. Gallagher had asked whether "Old Doc" Heineman could help out (R. 229a-230a).

124a-125a). A few days later, Sober informed Mr. Heyman that the most the bank could loan was $13,600, and suggested he see Heineman (R. 125a). After a loan had been arranged, Heineman backed out (R. 130a-131a). Mr. Heyman next saw petitioner Cypher, a director of the bank (R. 131a, 345b). A loan was arranged for $46,000 or "two for one" (R. 136a). Cypher claimed he put up a certificate of deposit for $10,000 (R. 338b) and received $23,000 of the proceeds which were also placed in a certificate of deposit as collateral, partially for "advice and services" (R. 351b, 354b).

b. *False-entry counts.*

(1). Four loans representing approximately one-half of the total F.H.A. loans as shown on the records of The Old Freeport Bank had not in fact been insured by the F.H.A. (R. 173b). Petitioner Ira Sober, who handled the loans and was told in one instance that the loan was not insured by F.H.A. (R. 152a, 311a), claimed these were just carried that way from the start and never removed (R. 319a).

(2). The Reports of Condition of the bank submitted to Washington (R. 197a) incorrectly reported the amount of F.H.A. insured loans and were signed by petitioners Reese and C. I. Sober (R. 201a, 203a). Reese knew the F.H.A. loans were not complete (R. 348a). Minutes of a Board of Directors meeting (R. 397b) prepared by petitioner Reese, as secretary, reflected that the Board had decided that one of the mortgages involved was to be handled as a conventional mortgage rather than as an F.H.A. insured loan (R. 349a).

(3). Petitioner Ira Sober purchased an auto for which the bank issued a cashier's check to Mr. Piecoli (R. 193a). Two months later, loan papers were entered at the bank indicating a discounted loan from "Jack's Auto Sales" (R. 192a-196a). Mr. Jack did not sell petitioner Ira Sober the car (R. 113b, 116b).

3. The closing arguments.

The closing arguments are printed in full in the government's appendix (R. 409b-514b).

a. *Argument for petitioners.*

Petitioners' counsel began by describing his own physical condition and relating that his co-counsel was at home—sick (R. 409b-410b). Next he informed the jury of certain principles of law—"precepts" (R. 410b-411b). He read from a book by Justice Bok of the Supreme Court of Pennsylvania to the effect that more innocent people are convicted than guilty acquitted (R. 411b). He then discussed the fee-receiving counts and stated that "on the important elements of this case there isn't any dispute" (R. 414b)—that the petitioners, who were charged with receiving funds from loans, did actually receive them (R. 414b, 417b). He then characterized the testimony of the first government witnesses—the Gallaghers—as "Why all this phoney story of the Gallaghers? * * * I don't know what's behind it, and I'm going to ask you to help me find out. I have an idea why." (R. 415b). He explained that petitioners' theory was that they did not get paid for obtaining

a loan, but merely made an investment for which they were paid (R. 417b).

Later, he quoted Bob Hope as saying you only can get a loan from the bank when you do not need money (R. 419b). He continually reiterated—"What is behind all this * * *" (R. 427b). Counsel described how he was able to answer a question before a witness could, because he had overheard the witness just before he came in the courtroom (R. 428b). The government objected. While recognizing there was no such record evidence, the court merely recessed the jury for 10 minutes (R. 429b-430b).

Counsel further discussed the evidence of the false entries and claimed no motive had been shown, at most gross negligence (R. 437b-442b). As to the car entry, he asked the jury to consider why the defendants were not indicted sooner, if it was a crime (R. 444b).

Counsel related how a man had been tried and convicted of murder on circumstantial evidence and later someone else confessed to the crime (R. 449b-450b). He then described how petitioner C. L. Sober had made a success of the bank (R. 451b-452b), noting: "Members of the jury what you have seen in Allegheny County is, two giants have arisen; they have absorbed and eaten up every bank around here. * * * This is one bank where the bank is for the people." (R. 452b). He closed with a story from a Pittsburgh paper on jury duty (R. 454b), and asked that the jury characterize the petitioners' acts as mistakes but not crimes (R. 455b).

b. *Argument for the government.*

The government's closing argument noted that this was not a murder case, but a case against responsible businessmen (R. 457b). Counsel spoke on the presumption of innocence and answered opposing counsel's reference to Justice Bok's book by suggesting it would be interesting to know how anyone could compile such statistics (R. 458b-459b). He summarized the issue as to receiving a fee for a loan by stating that, if the people were paying to get a loan, the statute was violated, but if for advancing collateral then the defendants may not have violated the statute (R. 460b). He answered opposing counsel's statement that Charles Sober "did not get one penny" by noting that he was not charged with this and thus counsel had set up his own "strawman" to knock down (R. 461b). He commented that the answer to the constant inquiry as to why Sober was charged could also be found in the evidence showing Sober's ownership of bank stock (R. 461b). He then pointed out the similarity of procedure on the loan transactions, discussed this evidence (R. 462b-463b), and suggested that, when Sober said that the bank could loan only part of the requested funds, that was "part of the scheme" (R. 464b). He noted that, although defense counsel had said their story was "phoney," all these people told and described the same scheme (R. 464b-465b).

In describing Charles Sober's part as an aider and abettor, government counsel said that if the principal —Heineman—is guilty, "Sober is guilty. They hang together, there is no difference in the quantum of proof as to the two of them" (R. 471b). He char-

acterized "Good Old Doc"—petitioner Heineman—as helping out the Burketts, for which he wanted $800. He argued that the evidence was clear that this was a kickback for a loan and not a fee for putting up collateral (R. 473b-474b).

He said the defense made these petitioners appear as men of a big-heart, while all government witnesses were pictured as making up phoney stories (R. 475b). He summarized the Heyman transaction as a young man who needed to consolidate his debts because he couldn't pay $300 a month, so big-hearted Cypher and big-hearted Sober fixed it so he'd have to pay $9,000 a year (R. 478b). He questioned whether it was reasonable that Cypher was being paid by a greenhouse owner—Heyman—$23,000 for advice (R. 480b), and stated Cypher "was getting $23,000 for loan sharking" (R. 481b).

He referred to defense counsel's reference to other banks as throwing in the red herring, and suggested that the court would say that this had no bearing in this case (R. 500b).

He stated, as to the false entry counts, that Ira Sober knew the four mortgages were not F.H.A. mortgages (R. 504b) and that in reporting the condition of the bank there could be no claim of innocence by relying on books that petitioner himself had "gummied up" (R. 507b). He answered defense counsel's inquiry as to why other directors were not indicted by saying that a distinction was made between those who had other occupations and those, such as Sober, who were in the bank and knew of these matters (R. 507b-508b). Finally, as to the auto

transaction, he questioned whether a bank employee could just put a slip in the drawer, saying "I took the money" and asked "does that make it all right?" (R. 508b). He closed by telling the jury that, if they believed the government evidence, to return a verdict of guilty, but if they did not believe the witnesses, but instead Sober and Heineman, "then of course you should acquit as to any such count" (R. 514b).

4. The rulings

a. Subsequent to the conviction, the court held a hearing on a motion for a new trial based upon affidavits—Exhibits AA and BB (R. 556b-567b). Mr. Heyman testified that he had told the truth at the trial (R. 591b). He later dictated a statement at defense counsel's office (R. 592b-595b) in which he said that he felt his testimony was colored due to pretense of the examiners. He testified that he did not want to feel he was the cause for implicating a man—C. L. Sober—"that I know in my case didn't have anything to do with it" (R. 605b). The government agents testified they had not promised the witness anything (R. 603b, 383a).

The trial court in a supplemental opinion and order found that no government agent had induced any witness to falsify or color his testimony and that there was no recantation. It therefore denied the motion for a new trial (R. 411a-415a). The trial court held that the government had sustained its burden of proof on the charges (R. 405a). After examining the record and the speech and conduct of

government counsel, it found "no impropriety which justifies a new trial" (R. 407a).

b. The Court of Appeals, after reviewing the evidence, found it amply supported the convictions (Pet. 52-55). Judge McLaughlin's opinion further detailed the government summation and found that a full reading "does not reveal a single instance where the District Attorney failed to live up to his high obligation" (Pet. 58). Chief Judge Biggs joined by Judge Hastie, in a concurring opinion, agreed that the convictions must be affirmed, but stated that they could not praise the United States Attorney's summation as he should not have succumbed to the temptation "to rebut in kind." They felt it was the duty of the trial judge to see that the trial was conducted with "due propriety" (Pet. 67).

ARGUMENT

1. Petitioners' series of attacks on the evidence, which were fully reviewed by both courts below, is without merit. The guilt of the petitioners on all counts is clear and overwhelming.

a. There is no dispute that all factual elements of the crimes were proved. 18 U.S.C. 220 prohibits a bank director from receiving a fee for procuring a bank loan. As to the counts under that statute, the evidence disclosed that the bank at first refused to loan the amount requested; the director in each case made arrangements, received a fee, and only then were the loans made by the bank. This is exactly what the statute forbids. The obtaining of money for a loan is not excused under this statute because

the transactions are clearly recorded. (Cf. 18 U.S.C. 219, a statute which permits certain commissions if recorded). In any event, whether the fee was paid for additional collateral, as petitioners claim, or whether it was paid to obtain a bank loan, as the government charged, was resolved by the jury under the charge (R. 526b-528b).

b. Petitioners argue that the Court of Appeals improperly failed to construe 18 U.S.C. 220 (Pet. 50-51). We think the Section is clear on its face. Its genesis was the Banking Act of 1913, 38 Stat. 272, and it has been regularly applied. *United States* v. *Lotsch*, 102 F. 2d 35 (C.A. 2), certiorari denied, 307 U.S. 622; *Ryan* v. *United States*, 278 F. 2d 836 (C.A. 9); see also *Fleishhacker* v. *Blum*, 109 F. 2d 543 (C.A. 9), certiorari denied, 311 U.S. 665. In this case, there was no question of the scope of the statute. The jury was charged that petitioners could not be found guilty if the fee had been received solely for the personal risk of some part of the collateral, unless this was a mere subterfuge (R. 527b-528b). Hence the jury, in effect, has found that petitioners' assumed facts do not exist. There was thus no reason to decide whether the statute prohibits "risk taking" by bank directors.

c. The conspiracy counts are similarly clear. Each participant performed an essential role. Petitioner Charles Sober at first refused the loan and then recommended or encouraged the use of a bank director, who, for an appropriate fee, secured the previously unobtainable bank loan. In fact, the emerging pattern, shown by the similarity of the procedure, indi-

cates that the scheme had developed into a way of doing business.

d. As to the false-entry counts, the essential fact of the falsity of the record—either as to F.H.A. mortgages, the reports of condition of the bank, or the unrecorded cash advance—is undisputed. In each instance the petitioners concerned sought to convince the jury that it was either unintentional or merely gross negligence. The short answer is that under proper and unchallenged instructions (R. 548b) the jury found against these claims.

2. Petitioners complain that the conduct of government counsel, particularly in summation, denied them due process. The trial judge found no impropriety which justified a new trial (R. 407a). One judge on the Court of Appeals thought the government counsel lived well up to his high obligation and two judges thought his conduct fell "just short of that degree of impropriety as would require a new trial" (Pet. 67). We think the conduct presents no cause for a new trial.

While only a reading of the whole trial and the closing arguments of both sides, in full, can accurately measure the propriety of the conduct of the government counsel, we have attempted to summarize both closing arguments in the Statement, *supra*, pp. 7-11. There are additional factors in this case which indicate that no prejudice ensued and which militate against review.

As discussed above, the essential facts were undisputed and the guilt of each petitioner was overwhelmingly proved. No judge on the Court of Ap-

peals, after full review, evinced any doubt as to the guilt of petitioners. In this context, petitioners' counsel endeavored to argue matters outside the record. Thus, he argued what *he* had heard; surmised that two other, giant, banks had absorbed the competition, except for petitioners' bank, with the implication that this was the cause of the indictments; characterized government witnesses' testimony as "phoney"; suggested that not everyone had been indicted and therefore that only certain petitioners were being accused; and intimated that more innocent people are convicted than guilty ones are acquitted. The government counsel's conduct cannot be viewed *in vacuo*, without this background, for to do so is to "load the scales." *Di Carlo* v. *United States*, 6 F. 2d 364, 368 (C.A. 2).

As the concurring circuit judges observe, it is the duty of the trial judge to make sure that the trial is conducted with due propriety by both sides. However, when the trial judge in this case, after the government's objection, did nothing about petitioners' counsel's summation, even while recognizing it had gone beyond the record in one instance (R. 429b), it became necessary for government counsel to answer. Thus, such recent cases as *Handford* v. *United States*, 260 F. 2d 890 (C.A. 5), reversed on confession by the government, 359 U.S. 120, involving unprovoked impropriety, are inapposite to the conduct permitted where petitioners' counsel's activities, which were far beyond those employed by the government, provoked

and invited answers.[3] Since petitioners' counsel clearly exceeded the bounds of propriety, we suggest the petitioners are in no position to claim that they were prejudiced by the government conduct. In any event, government counsel's actions in this case were far from the type denounced in *Berger* v. *United States*, 295 U.S. 78, and we think that in the light of the long hard trial and the defense summation, were within the bounds of propriety.[4]

3. Petitioners Reese and Ira Sober claim that they were denied due process by their trial together with the other petitioners after the trial court had granted their motion for judgment of acquittal as to the conspiracy and fee-receiving counts.

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[3] While we recognize that a higher standard applies to government counsel, it must also be borne in mind that if a trial judge allows defense counsel to roam at will a resulting acquittal will not be overturned because of counsel's impropriety, and thus a defense counsel has an incentive to go as far as the trial court will permit.

[4] Subpart (b) of petitioners' Point V (Pet. 44) attempts to relate this case to *Stirone* v. *United States*, 361 U.S. 212. This is inapposite. *Stirone* clearly involved an erroneous charge to the jury while petitioners here make no such claim. Subpart (c) (Pet. 45) relates to the refusal to allow evidence that one of the government witnesses had offered a similar fee to obtain a loan. This is clearly irrelevant as to whether the petitioner, here charged, *received* a fee. Subpart (d) (Pet. 46) complains of the denial of a new trial because some witnesses, after a special hearing, admitted they had told the truth, although they said they could have told it differently. Under the circumstances, we think the district judge properly denied a new trial. See the supplemental opinion (R. 411a-415a).

The short answer is they originally did not feel they were prejudiced since they failed to ask for a separate trial (R. 406a). *Schaffer* v. *United States*, 362 U.S. 511. That they were in fact not prejudiced is shown by the careful division made by the jury between findings of not guilty and of guilty on various counts. See the chart attached to the trial court's opinion at R. 409a-410a.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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